184

Supreme Court, U.S.
FILED

101199 2011

No. OFFICE OF THE CLERK

In the
Supreme Court of the United States

EXTREME NETWORKS, INC.,
Petitioner,

v.

ENTERASYS NETWORKS, INC.
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

MARGARET M. DUNCAN*
KEITH M. STOLTE
MCDERMOTT WILL & EMERY LLP
227 West Monroe Street
Suite 4400
Chicago, Illinois 60606
(312) 372-2000
mduncan@mwe.com

M. MILLER BAKER
MICHAEL S. NADEL
JEFFREY W. MIKONI
MCDERMOTT WILL & EMERY LLP
600 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 756-8000

Attorneys for Petitioner Extreme Networks, Inc.
** Counsel of Record*

March 2011

QUESTIONS PRESENTED

1. Whether an unqualified money judgment for a sum certain is final for purposes of appellate jurisdiction under 28 U.S.C. §§ 1291 and 1295.

2. Whether, when a postjudgment motion tolls the time to file a notice of appeal under Federal Rule of Appellate Procedure 4(a)(4)(A), the time to appeal runs from the date of an order granting the motion or from the date of a judgment's alteration or amendment upon such motion.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner Extreme Networks, Inc., states that it has no parent corporation and that no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

STATUTORY PROVISIONS AND RULES INVOLVED 2

STATEMENT OF THE CASE 9

REASONS FOR GRANTING THE PETITION 13

I. The Courts of Appeal Are in Disarray Regarding the Finality of an Unqualified Money Judgment for a Sum Certain That Does Not Include Prejudgment Interest 16

II. The Courts of Appeals Are Divided Over Whether the Time to Appeal Runs From the Date of an Order Granting a Postjudgment Tolling Motion or From the Date of Any Subsequent Amended Judgment 22

III. The Questions Presented Involve Recurring and Important Issues of Federal Practice That This Court Should Resolve 26

IV. The Federal Circuit Lacked Jurisdiction Over Respondent's Untimely Appeal 27

CONCLUSION 31

TABLE OF CONTENTS (Cont'd)

Appendix A – The Federal Circuit's decision below ..... Pet. App. 1a–15a.

Appendix B – The district court's October 28, 2008 Opinion and Order ..... Pet. App. 16a–32a.

Appendix C – The district court's November 5, 2008 Judgment ..... Pet. App. 33a–35a.

Appendix D – The district court's March 16, 2009 Order ..... Pet. App. 36a–50a.

Appendix E – The district court's March 19, 2010 Amended Judgment ..... Pet. App. 51a–54a.

Appendix F – The Federal Circuit's December 20, 2010 Order denying Petition for Rehearing and Rehearing En Banc ..... Pet. App. 55a–56a.

Appendix G – The Federal Circuit's December 29, 2010 Order denying Petition for Rehearing ..... Pet. App. 57a–58a.

TABLE OF AUTHORITIES

CASES

Acosta v. La. Dep't of Health & Human Resources, 478 U.S. 251 (1986) 30

Bankers Trust Co. v. Malis, 435 U.S. 381 (1978) 18, 29

Bennett v. City of Holyoke, 362 F.3d 1 (1st Cir. 2004) 23

Budinich v. Becton Dickinson & Co., 486 U.S. 196 (1988) 14, 17, 27, 28

Capstick v. Allstate Ins. Co., 998 F.2d 810 (10th Cir. 1993) 19

Cardillo v. United States, 767 F.2d 33 (2d Cir. 1985) 23, 24

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) 13

Commercial Union Ins. Co. v. Seven Provinces Ins. Co., 217 F.3d 33 (1st Cir. 2000) 17, 21

Crowe v. Bolduc, 365 F.3d 86 (1st Cir. 2004) 19, 21

Dunn v. Truck World, Inc., 929 F.2d 311 (7th Cir. 1991) 20

Employers Insurance of Wausau v. Titan International, 400 F.3d 486 (7th Cir. 2005) 24, 25, 30

Grupo Dataflux v. Atlas Global Group, LP, 541 U.S. 567 (2004) 27

Herzog Contracting Corp. v. McGowan Corp., 976 F.2d 1062 (7th Cir. 1992) 20, 21, 28

Kaszuk v. Bakery & Confectionary Union & Indus. Int'l Pension Fund, 791 F.2d 548 (7th Cir. 1986)..... 17, 21

Kunz v. DeFelice, 538 F.3d 667 (7th Cir. 2008)..... 25

McCalla v. Royal Maccabees Life Ins. Co., 369 F.3d 1128 (9th Cir. 2004) 18

McNabola v. Chicago Transit Auth., 10 F.3d 501 (7th Cir. 1993)..... 19, 21

Osterneck v. Ernst & Whinney, 489 U.S. 169 (1989) ..... *passim*

Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62 (1948) 27

Reyher v. Champion Int'l Corp., 975 F.2d 483 (8th Cir. 1992)..... 19

Schake v. Colt Indus. Operating Corp. Severance Plan, 960 F.2d 1187 (3d Cir. 1992)..... 18

Stern v. Shouldice, 706 F.2d 742 (6th Cir. 1983)..... 25

Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988) 30

United States v. Williams, 504 U.S. 36 (1992) 26

White v. N.H. Dep't of Emp't Sec., 455 U.S. 445 (1982) 17

STATUTES

28 U.S.C. § 1291 ..... 12, 18, 29
28 U.S.C. § 1295 27
28 U.S.C. § 1295(a)(1) 12

RULES

Fed. R. App. P. 4(a)(1)(B) 23
Fed. R. App. P. 4(a)(4)(A) ..... *passim*
Fed. R. App. P. 4(a)(4)(A) (1983) 24
Fed. R. App. P. 4(a)(4)(A)(i) 22
Fed. R. App. P. 4(a)(4)(A)(iv) 10, 22
Fed. R. App. P. 4(a)(4)(A)(v) 10
Fed. R. App. P. 4(a)(4)(A)(vi) 10
Fed. R. Civ. P. 50(b) 22
Fed. R. Civ. P. 52(b) 22
Fed. R. Civ. P. 54(a) 18, 29
Fed. R. Civ. P. 54(b) 28
Fed. R. Civ. P. 58(a) 9, 25
Fed. R. Civ. P. 58(b)(1)(B) 28
Fed. R. Civ. P. 58(e) 22
Fed. R. Civ. P. 59(a) 10, 11, 22
Fed. R. Civ. P. 59(e) ..... *passim*
Fed. R. Civ. P. 60(b) 10, 11, 12

OTHER AUTHORITIES

10 James Wm. Moore et al., *Moore's Federal Practice* § 54.02 (3d ed. 2011) 18

12 James Wm. Moore et al., *Moore's Federal Practice* § 60.11[3] (3d ed. 2011) 19

The American Heritage Dictionary of the English Language (1981) 30

PETITION FOR A WRIT OF CERTIORARI

Extreme Networks, Inc., respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The Federal Circuit's decision below, *Extreme Networks, Inc. v. Enterasys Networks, Inc.*, 395 F. App'x 709 (Fed. Cir. 2010), is reprinted at Pet. App. 1a–15a. The Federal Circuit's orders denying rehearing are reprinted at Pet. App. 55a–58a.

The district court's October 28, 2008 Opinion and Order disposing of the parties' post-trial motions (available in Lexis at 2008 U.S. Dist. LEXIS 88540 (W.D. Wis. Oct. 28, 2008)) is reprinted at Pet. App. 16a–32a. The district court's November 5, 2008 Judgment is reprinted at Pet. App. 33a–35a. The district court's March 16, 2009 order disposing of postjudgment motions (available in Lexis at 2009 U.S. Dist. LEXIS 22735 (W.D. Wis. March 16, 2009)) is reprinted at Pet. App. 36a–50a. The district court's March 19, 2009 Amended Judgment is reprinted at Pet. App. 51a–54a.

JURISDICTIONAL STATEMENT

The Federal Circuit issued its opinion in this case on September 30, 2010. The Federal Circuit denied petitioner's timely-filed petition for rehearing and rehearing en banc on December 20, 2010, Pet. App. 55a, and similarly denied respondent's timely-

filed petition for rehearing on December 29, 2010. Pet. App. 57a. Chief Justice Roberts extended the time to file a petition for a writ of certiorari until April 28, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

28 U.S.C. § 1291, "Final decisions of district court," provides:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

---

28 U.S.C. § 1295, "Jurisdiction of the United States Court of Appeals for the Federal Circuit," provides in pertinent part:

> (a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

(1) of an appeal from a final decision of a district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, if the jurisdiction of that court was based, in whole or in part, on section 1338 of this title, except that a case involving a claim arising under any Act of Congress relating to copyrights, exclusive rights in mask works, or trademarks and no other claims under section 1338(a) shall be governed by sections 1291, 1292, and 1294 of this title . . . .

Federal Rule of Civil Procedure 58 provides, in pertinent part:

FRCP 58. ENTERING JUDGMENT

(a) Separate Document.

Every judgment and amended judgment must be set out in a separate document, but a separate document is not required for an order disposing of a motion:

(1) for judgment under Rule 50(b);

(2) to amend or make additional findings of fact under Rule 52(b);

(3) for attorney's fees under Rule 54;

(4) for a new trial, or to alter or amend the judgment, under Rule 59; or

(5) for relief under Rule 60.

(b) Entering Judgment.

(1) Without the Court's Direction.

Subject to Rule 54(b) and unless the court orders otherwise, the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when:

(A) the jury returns a general verdict;

(B) the court awards only costs or a sum certain; or

(C) the court denies all relief.

(2) Court's Approval Required.

Subject to Rule 54(b), the court must promptly approve the form of the judgment, which the clerk must promptly enter, when:

(A) the jury returns a special verdict or a general verdict with answers to written questions; or

(B) the court grants other relief not described in this subdivision (b).

Federal Rule of Civil Procedure 59 provides, in pertinent part:

FRCP 59. NEW TRIAL; ALTERING OR AMENDING A JUDGMENT

. . .

(e) Motion to Alter or Amend a Judgment.

A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

Federal Rule of Civil Procedure 60 provides, in pertinent part:

FRCP 60. RELIEF FROM A JUDGMENT OR ORDER

. . .

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding.

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been

discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

Federal Rule of Appellate Procedure 4 provides, in pertinent part:

FRAP 4. APPEAL AS OF RIGHT – WHEN TAKEN

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered . . .

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

(B) . . .

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of

> appeal, or an amended notice of appeal . . . within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

STATEMENT OF THE CASE

1. Petitioner brought this action for patent infringement against the respondent in the United States District Court for the Western District of Wisconsin. Respondent counterclaimed with its own patent infringement claims against petitioner.

Prior to trial, the district court entered summary judgment against respondent or otherwise dismissed respondent's patent infringement counterclaims. At trial in May 2008, the jury found that respondent infringed petitioner's three patents and awarded $201,213 in damages to petitioner.

On October 28, 2008, the district court issued an "Opinion and Order" resolving post-trial motions and directing the clerk to enter judgment in favor of petitioner. Pet. App. 16a. The order further provided that "[t]his Court retains jurisdiction to enforce any and all aspects of this order and to award plaintiff supplemental damages, interest or costs."[1] Pet. App. 32a.

On November 5, 2008, the district court entered "Judgment in a Civil Case" in a separate document, in compliance with Federal Rule of Civil Procedure 58(a). Pet. App. 33a–35a (hereinafter, "November

---

[1] In referring to "supplemental damages," the district court meant petitioner's damages for the period after January 8, 2008. The jury awarded damages in the form of a reasonable royalty from the period of the commencement of the suit in April 2007 until January 8, 2008, the period for which sales information had been produced.

Judgment"). The November Judgment dismissed respondent's patent infringement counterclaims with prejudice, awarded petitioner the unqualified sum certain of $201,213, and permanently enjoined respondent from infringing petitioner's patents. Pet. App. 33a–35a.

Both petitioner and respondent filed motions to modify the injunction within 10 days of the entry of the November Judgment. Petitioner characterized its motion as a Federal Rule of Civil Procedure 59(e) motion to amend or alter the judgment; respondent characterized its motion as a Federal Rule of Civil Procedure 60(b) motion for relief from judgment. Respondent also filed a Civil Rule 59(a) motion for a new trial. For present purposes, the significance of these motions is that they tolled the time to file a notice of appeal from the November Judgment. *See* Fed. R. App. P. 4(a)(4)(A)(iv), (v), and (vi).

On December 30, 2008, petitioner filed a motion for supplemental damages (to account for damages incurred after January 8, 2008) and for prejudgment interest. Petitioner did not invoke any rule in filing this motion. Because it was filed outside of the then-applicable 10-day time limit of Federal Rule of Appellate Procedure 4(a)(4)(A),[2] this motion—unlike the parties' motions discussed in the preceding paragraph—did not toll the time to file a notice of appeal from the November Judgment.

---

[2] On December 1, 2009, amendments to Appellate Rule 4 took effect that increased the 10-day time limit to 28 days. Those amendments are not relevant to this case.

On March 16, 2009, the district court entered an order disposing of all pending postjudgment motions. Pet. App. 36a–50a. This order granted in part respondent's Civil Rule 60(b) motion to modify the injunction, denied petitioner's Civil Rule 59(e) motion to modify the injunction, denied respondent's Civil Rule 59(a) motion for a new trial, and granted in part petitioner's non-tolling motion for supplemental damages and prejudgment interest.

The district court entered an "Amended Judgment in a Civil Case" on March 19, 2009. Pet. App. 51a–54a. The Amended Judgment differed from the November Judgment in two respects: First, the Amended Judgment modified the terms of the injunction; and second, the Amended Judgment additionally provided for $48,304 in supplemental damages and $15,297 in prejudgment interest. Pet. App. 52a–54a.

Respondent filed a notice of appeal from the Judgment and Amended Judgment on April 17, 2009, 32 days after the district court disposed of the parties' tolling motions.

2. On appeal in the Federal Circuit, respondent sought reversal of the district court's summary judgment against respondent's patent infringement counterclaims reflected in the district court's November Judgment. Respondent did not seek Federal Circuit review or reversal of any aspects of the amended portion of the Amended Judgment, *i.e.*, the terms of the modified injunction, the supplemental damages, and prejudgment interest.

Petitioner challenged the Federal Circuit's appellate jurisdiction on the basis that respondent's notice of appeal was untimely, as it was filed more than 30 days after the district court's disposition of the parties' postjudgment motions that tolled the time to appeal. In response, respondent argued that the district court's November Judgment was not final because it did not account for prejudgment interest or supplemental damages, and that the only final judgment was the Amended Judgment. Respondent argued in the alternative that to the extent that the November Judgment was final, the language "disposing of " as used in Appellate Rule 4(a)(4)(A) should be interpreted as "denying," not "denying or granting," and that the 30-day time period to file a notice of appeal ran from the entry of the Amended Judgment—not the order granting respondent's Civil Rule 60(b) motion to modify the injunction.

After full merits briefing and argument, the Federal Circuit issued a "nonprecedential" decision. As to appellate jurisdiction, the Federal Circuit held that the November Judgment was not final for purposes of 28 U.S.C. § 1295(a)(1)[3] because it did not include prejudgment interest, Pet. App. 7a, and that the case became final only when the district court

---

[3] Section 1295(a)(1) confers exclusive appellate jurisdiction upon the Federal Circuit from "final decision[s]" of district courts in patent and certain other categories of cases. Section 1295(a)(1) is the analogue to 28 U.S.C. § 1291, which confers appellate jurisdiction upon the regional courts of appeals from "final decisions" of district courts in cases outside of the jurisdiction of the Federal Circuit.

entered its Amended Judgment, which awarded prejudgment interest. *Id.* at 8a. Because the respondent filed its notice of appeal within 30 days of the entry of the Amended Judgment, the court of appeals concluded, the appeal was timely. *Id.* Reaching the merits, the Federal Circuit vacated the district court's summary judgment as to one of respondent's patent infringement counterclaims and remanded for trial. Pet. App. 11a–12a.

The Federal Circuit thereafter denied petitions for rehearing filed by both parties, as well as respondent's motion, agreed to by petitioner, to stay the mandate pending any petitions for certiorari.

REASONS FOR GRANTING THE PETITION

One of the federal judiciary's most important tasks is the proper determination of its own jurisdiction. *See, e.g.*, *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."). For that reason, both the judiciary system and the litigants who participate in it benefit from clear, administrable rules governing the jurisdictional limits of the federal courts.

Petitioner asked the Federal Circuit to resolve a simple question that has nevertheless divided the circuits: whether, when a postjudgment motion tolls the time to file a notice of appeal under Appellate Rule 4(a)(4)(A), the time to appeal runs from the date of an order granting the motion or from the date

of a judgment's alteration or amendment upon such motion. Rather than confront the issue directly, the Federal Circuit avoided the question by holding that the November Judgment against respondent was not final and hence not appealable in the first instance, because it did not include any award of prejudgment interest.

The Federal Circuit's finality holding reflects a widespread confusion shared across the courts of appeals. As a general rule, a "final judgment" is one "which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment," save for ministerial tasks that "will not alter the order or moot or reverse decisions embodied in that order." *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199 (1988). Here, the November Judgment finally resolved all claims between the parties and granted unqualified compensatory relief in the form of a sum certain—all that was needed for the judgment to be final and appealable. There is therefore no material difference between this case and *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989), in which this Court treated an unqualified money judgment for a sum certain as a final and appealable judgment, subject to amendment under Civil Rule 59(e).

The courts of appeals, however, have relied upon *Osterneck* to reach antithetical conclusions. Some cite *Osterneck* for the proposition that a money judgment silent on prejudgment interest is not final. Others cite *Osterneck* to hold that a money judgment lacking prejudgment interest is nevertheless final and appealable, and can be

corrected only by the timely filing of a Civil Rule 59(e) motion to amend the judgment. In its effort to avoid the real jurisdictional question presented by respondent's untimely appeal, the Federal Circuit plunged headlong into this same morass.

Had the Federal Circuit recognized the finality of the district court's November Judgment and proceeded to consider the meaning of Appellate Rule 4(a)(4)(A), as petitioner urged it to do, its duty should have been clear. The rule's plain text states that, upon the filing of certain postjudgment motions, "the time to file an appeal runs for all parties from the entry of the order *disposing* of the last such remaining motion." Fed. R. App. P. 4(a)(4)(A) (emphasis added). At least two circuits understand this to mean that regardless of whether a judgment is amended or altered upon such an order, the time to appeal runs from entry of the order disposing of the motion. But at least two other circuits have tortured Appellate Rule 4(a)(4)(A)'s text in order to conclude that appellate timeliness should be measured from the date of a subsequent amended judgment in cases where the district court amends or alters the judgment.

The plain meaning of Appellate Rule 4(a)(4)(A) compels the conclusion that the Federal Circuit lacked jurisdiction to hear respondent's untimely appeal, much less to reverse the district court's grant of summary judgment and remand for a trial. Instead, the Federal Circuit sustained both respondent's appeal and its merits argument. This petition thus presents two important questions pertaining to federal appellate jurisdiction. To

provide predictability and uniformity where none now exists, this Court should grant review.

I. The Courts of Appeal Are in Disarray Regarding the Finality of an Unqualified Money Judgment for a Sum Certain That Does Not Include Prejudgment Interest.

The decision below highlights widespread confusion in the courts of appeals regarding whether a money judgment for a sum certain that does not award prejudgment interest is final for purposes of appellate jurisdiction. On one hand, three circuits, including the Federal Circuit below, have held that a money judgment that does not include prejudgment interest is not "final" because prejudgment interest is an "element of complete compensation" owed to a plaintiff. On the other hand, six circuits view postjudgment requests for prejudgment interest as motions to amend or alter the judgment under Civil Rule 59(e), as this Court did in *Osterneck*. These circuits assume that money judgments for a sum certain are final, and allow prejudgment interest to be added only when parties make timely Civil Rule 59(e) motions. These two positions are irreconcilable, yet both are regularly espoused by the courts of appeals, including panels within the same circuits.

The confusion stems from this Court's decision in *Osterneck*. At issue in *Osterneck* was whether a postjudgment motion for prejudgment interest constituted a motion to "alter or amend" the judgment under Civil Rule 59(e). This Court held that postjudgment motions for prejudgment interest

are made under Civil Rule 59(e) because prejudgment interest "'is an element of [plaintiff's] complete compensation.'" *Id.* at 175. As such, prejudgment interest contrasts with claims for attorney's fees, which this Court previously characterized as not implicating Civil Rule 59(e) because a claim for attorney's fees is "collateral 'to the main cause of action,' requiring an inquiry that was wholly 'separate from the decision on the merits.'" *Id.* at 174 (quoting *White v. N.H. Dep't of Emp't Sec.*, 455 U.S. 445, 451–452 (1982)). The holding and rationale of *Osterneck* have steered the lower courts in conflicting directions.

a. *Osterneck* establishes that questions of prejudgment interest are part of the plaintiff's compensation and hence involve the merits of the case. As a result, like the Federal Circuit below, the First and Seventh Circuits have concluded, based on *Osterneck* and its discussion of *Budinich*, that a money judgment that does not provide prejudgment interest necessarily lacks finality. *See, e.g.*, *Commercial Union Ins. Co. v. Seven Provinces Ins. Co.*, 217 F.3d 33, 37 (1st Cir. 2000) (holding that a money judgment lacking prejudgment interest was not final, citing *Osterneck*); *Kaszuk v. Bakery & Confectionary Union & Indus. Int'l Pension Fund*, 791 F.2d 548, 553 (7th Cir. 1986) (same).

b. On the other hand, *Osterneck*'s holding that postjudgment demands for prejudgment interest fall under Civil Rule 59(e) implicitly establishes that an antecedent merits judgment that does not address prejudgment interest *must* necessarily be final. As a logical matter, such "motions to alter or amend a

judgment" can only be filed to challenge appealable judgments. *See* Fed. R. Civ. P. 54(a) ("'Judgment' as used in these rules includes . . . any order from which an appeal lies."); *Bankers Trust Co. v. Malis*, 435 U.S. 381, 384 n.4 (1978) ("A 'judgment' for purposes of the Federal Rules of Civil Procedure would appear to be equivalent to a 'final decision' as that term is used in 28 U.S.C. § 1291."); *see also* 10 James Wm. Moore et al., *Moore's Federal Practice* § 54.02, at 54-20 (3d ed. 2011) ("Rule 59 requires that any motion for new trial or to alter or amend the judgment be served not later than 28 days 'after the entry of the judgment'; because Rule 54(a) defines the term 'judgment' as used in Rule 59, the time for filing a Rule 59 motion does not begin to run until an appealable judgment is entered.").

The First, Third, Seventh, Eighth, Ninth, and Tenth Circuits have therefore relied upon *Osterneck* to reject as untimely requests for prejudgment interest made outside of Civil Rule 59(e)'s strict time limit, on the grounds that the failure to timely file a challenge to a money judgment not containing prejudgment interest constituted a waiver of any claim to prejudgment interest. *See, e.g.*, *McCalla v. Royal Maccabees Life Ins. Co.*, 369 F.3d 1128, 1133 (9th Cir. 2004) (judgment lacking prejudgment interest "was final"; "operational consistency" required that any claim to prejudgment interest be brought within the time limit of Civil Rule 59(e)); *Schake v. Colt Indus. Operating Corp. Severance Plan*, 960 F.2d 1187, 1192 (3d Cir. 1992) ("The United States Supreme Court has held that 'a postjudgment motion for discretionary prejudgment interest involves the kind of reconsideration of

matters encompassed within the merits of a judgment.' Therefore, they must be timely filed within 10 days of entry of the *final judgment*, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure." (emphasis added; citation to *Osterneck* omitted)); *Reyher v. Champion Int'l Corp.*, 975 F.2d 483, 487–489 (8th Cir. 1992) (judgment for sum certain was silent as to prejudgment interest; plaintiff's motion for prejudgment interest was untimely Rule 59(e) motion, citing *Osterneck*); *Crowe v. Bolduc*, 365 F.3d 86, 92–93 (1st Cir. 2004) (judgment that was silent as to prejudgment interest could only be challenged by a Civil Rule 59(e) motion filed within the rule's 10 day time limit, citing *Osterneck*); *Capstick v. Allstate Ins. Co.*, 998 F.2d 810, 813 (10th Cir. 1993) (same); *McNabola v. Chicago Transit Auth.*, 10 F.3d 501, 520 (7th Cir. 1993) (same). *See also* 12 James Wm. Moore et al., *Moore's Federal Practice* § 60.11[3], at 60-41 (3d ed. 2011) ("[W]hen a judgment wholly omits prejudgment interest, the proper vehicle for augmenting the judgment to include prejudgment interest is a motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e)[.]"). If a money judgment for a sum certain that does not include prejudgment interest is not final, then Civil Rule 59(e)'s time limit would not apply, and these decisions denying prejudgment interest must be in error, because the judgments in these cases were never final to begin with.

The Seventh Circuit, in a decision written by Judge Posner, explained that the unstated assumption of *Osterneck* and the foregoing decisions is that the absence of prejudgment interest in a final

judgment does not destroy finality; it merely means that in entering judgment for a sum certain, the district court implicitly denied prejudgment interest, for which the remedy is either a timely Rule 59(e) motion or appeal:

> It is true that prejudgment interest is part of the judgment, not collateral to it, like attorney's fees [citing *Osterneck*]. But all that means, so far as bears on this case, is that if the judge had not awarded prejudgment interest, Herzog would have had to file a Rule 59(e) motion in order to get him to do so. *The omission of prejudgment interest would not have detracted from the finality of the original judgment; it just would have made it erroneous.*

Herzog Contracting Corp. v. McGowan Corp., 976 F.2d 1062, 1064 (7th Cir. 1992) (emphasis added).

c. The confusion over finality of money judgments lacking prejudgment interest is so deeply rooted that both views occasionally persist within the same opinion. For example, in *Dunn v. Truck World, Inc.*, another Seventh Circuit panel first seemed to recognize that a pending request for prejudgment interest could not disturb the finality of a money judgment, because "[f]inal judgment necessarily denies pending motions, and so starts the time for appeal." 929 F.2d 311, 313 (7th Cir. 1991) (collecting cases). But then the same panel proceeded to cite *Osterneck* for the proposition that "an outstanding request for pre-judgment interest defeats finality," notwithstanding its prior statement

regarding the effect a judgment has upon such outstanding requests. *See id.* The result is paradoxical: an outstanding request for prejudgment interest defeats the finality of a judgment, but the entry of an unqualified judgment for a sum certain denies any outstanding request for prejudgment interest.

It is therefore no surprise that both views have been inconsistently adopted and applied by the lower courts, including different panels within the same circuit. *Cf., e.g., Kaszuk*, 791 F.2d at 553, with *McNabola*, 10 F.3d at 520 (Seventh Circuit intra-circuit conflict); *Commercial Union Ins. Co.*, 217 F.3d at 37, with *Crowe*, 365 F.3d at 92–93 (First Circuit intra-circuit conflict). This case provides an ideal vehicle through which to clarify this question, by adopting a clear, bright-line rule, consistent with the reasoning of Judge Posner's opinion for the Seventh Circuit in *McGowan*, that an unqualified money judgment for a sum certain is final, and that the remedy for any erroneous omission of compensatory relief in the judgment is relief under Rule 59(e) or appeal.[4]

---

[4] For the same reasons, the unqualified November Judgment for a sum certain necessarily denied petitioner's claim for supplemental damages. Thus, resolution of the first question presented will also dispose of respondent's contention, advanced in but not addressed by the Federal Circuit, that the November Judgment was not final for the additional reason that the November Judgment did not resolve the issue of supplemental damages.

II. The Courts of Appeals Are Divided Over Whether the Time to Appeal Runs From the Date of an Order Granting a Postjudgment Tolling Motion or From the Date of Any Subsequent Amended Judgment.

Beyond the issue of finality, this case raises a second issue that has divided the lower courts. Under Appellate Rule 4(a)(4)(A), certain postjudgment motions[5] toll the time to file a notice of appeal until "*the entry of the order disposing of the last such remaining motion.*" Fed. R. App. P. 4(a)(4)(A) (emphasis added). The courts of appeals disagree whether the time to appeal runs from the date of an order granting a tolling motion or from the date of any subsequent amended judgment resulting from the granting of such a motion. If, as petitioner contends, the district court's original November Judgment was "final," then whether respondent's notice of appeal was timely filed also turns on resolution of this circuit split.

a. The First and Second Circuits recognize that, under Appellate Rule 4's plain text, when a tolling motion is filed and the motion is granted, the time to

---

[5] "Tolling motions" are motions for judgment as a matter of law under Civil Rule 50(b), to amend or make additional factual findings under Civil Rule 52(b), for attorney's fees under Civil Rule 54 (if, pursuant to Civil Rule 58(e), the district court orders an attorney's fees motion to have the same effect as a tolling motion), to alter or amend the judgment under Civil Rule 59(e), for a new trial under Civil Rule 59(a), or for relief under Civil Rule 60 (if filed not later than 28 days after judgment is entered). *See* Fed. R. App. P. 4(a)(4)(A)(i)–(vi).

appeal runs from the date of the order resolving the tolling motion, not the date of the entry of any amended or altered judgment.

In *Bennett v. City of Holyoke*, 362 F.3d 1 (1st Cir. 2004), the First Circuit held that the date of the resolution of a tolling motion controls the time to appeal a tolled judgment. In that case, a district court judgment was tolled by the timely filing of a motion for attorney's fees. *Id.* at 4. The First Circuit recognized that the time to appeal the tolled judgment therefore ran from the date the district court entered its order awarding attorney's fees to the plaintiff—not the date of the amended judgment, entered twelve days later. *Id.* at 4. As a result, the court of appeals determined that the appellant had noticed its appeal *after* the deadline set by Appellate Rule 4, because the notice of appeal was not filed within 30 days of the order disposing of the last outstanding tolling motion. *Id.*

Bennett is consistent with the Second Circuit's decision in *Cardillo v. United States*, 767 F.2d 33 (2d Cir. 1985). In *Cardillo*, the federal government failed to appeal a judgment within 60 days of the date of the order resolving the government's Civil Rule 59(e) motion to amend the judgment or for new trial,[6] as it believed that its time to appeal instead ran from the entry of an amended judgment a few days later. *Id.* at 34. The Second Circuit recognized

---

[6] In cases where the federal government is a party, Appellate Rule 4 extends the window to appeal a civil judgment to 60 days rather than 30. *See* Fed. R. App. P. 4(a)(1)(B).

that, under the plain language of Appellate Rule 4, the government's appeal was time-barred: "Rule 4(a)(4) of the Federal Rules of Appellate Procedure provides in pertinent part that, if a timely [tolling] motion is made . . . , the time to appeal shall run from the entry of the order granting or denying the motion. The consensus seems to be that this rule is mandatory and jurisdictional and should be applied literally." *Id.*[7]

b. The Sixth and Seventh Circuits take a contrary view, holding that when a judgment is amended or altered by a tolling motion, the time to appeal runs from the date of the entry of the amended or altered judgment, rather than the entry of the order granting the motion.

In *Employers Insurance of Wausau v. Titan International*, 400 F.3d 486 (7th Cir. 2005), the district court granted a Civil Rule 59(e) motion to amend the judgment, and later entered an amended judgment. The defendant appealed within 30 days of the amended judgment, but not within 30 days of the prior order resolving the tolling postjudgment motions. *Id.* The *Titan* court began by respecting

---

[7] *Cardillo* was decided under a prior version of Appellate Rule 4(a)(4)(A), which explicitly stated that the time to appeal ran from "the entry of the order denying a new trial or granting or denying any other [tolling] motion." *See* Fed. R. App. P. 4(a)(4)(A) (1983). The rule was amended in 1993 to use the word "disposing" as a synonym for "granting or denying," and there is no indication that the 1993 amendments were intended to effect a substantive change that would have overruled *Cardillo*.

the plain text of the rule, recognizing both that Appellate Rule 4(a)(4)(A) fixes a party's time to appeal from the date of an order "disposing" of a tolling motion and that "[g]ranting a motion is one way of 'disposing' of it." *Id.* at 488–489. But rather than follow the text to its logical conclusion, the Seventh Circuit perceived a tension between this reading and Civil Rule 58, which states that judgments and amended judgments must be set forth in separate documents, but that no separate document is required for orders "disposing" of the tolling Appellate Rule 4 motions. *See id.* (citing Fed. R. Civ. P. 58(a)). According to the *Titan* court, this created a "logically impossible" result—the court did not believe that Civil Rule 58 would require that amended judgments be subject to the separate-document rule only to then exempt the most likely causes of amended judgments from the rule. *See id.* Instead, the *Titan* court concluded that the word "disposing," as used in Appellate Rule 4(a)(4) and Civil Rule 58(a), should be interpreted to mean only "denying."[8]

Titan is consistent with the rule followed in the Sixth Circuit. *See Stern v. Shouldice*, 706 F.2d 742, 747 (6th Cir. 1983) (holding that the 30-day period to file a notice of appeal runs from the date of the entry of an amended judgment, rather than the order

---

[8] Although a later Seventh Circuit panel expressed concerns about the "tension [the *Titan* holding] creates with the language of the rule," the court of appeals followed *Titan* as a matter of stare decisis. *See Kunz v. DeFelice*, 538 F.3d 667, 674 (7th Cir. 2008).

granting a Rule 59(e) motion to amend the judgment).

* * *

The circuit conflict is clear. Under the interpretation of Appellate Rule 4(a)(4)(A) followed in the First and Second Circuits, respondent's notice of appeal was untimely if the November Judgment was final. Under the contrary interpretation advanced by the Sixth and Seventh Circuits, respondent's appeal was valid. This case therefore squarely provides a vehicle to resolve the conflict.[9]

III. The Questions Presented Involve Recurring and Important Issues of Federal Practice That This Court Should Resolve.

The questions presented are important and recurring questions of federal practice that implicate day-to-day litigation in the district courts and the courts of appeals. As such, both the federal judicial system and those who rely upon it would benefit from this Court's review.

This Court has repeatedly expressed the view that "'[t]he considerations that determine finality are not abstractions but have reference to very real

---

[9] Although the Federal Circuit did not pass upon this issue, petitioner pressed it in the Federal Circuit, thus preserving it for this Court's review. *See United States v. Williams*, 504 U.S. 36, 41 (1992) (holding the traditional "pressed or passed upon" rule for granting certiorari requires that the claim be either "pressed" or "passed," not both).

interests—not merely those of the immediate parties, but, more particularly, those that pertain to the smooth functioning of our judicial system.'" *Budinich*, 486 U.S. at 201 (citing *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 69 (1948)). Such smooth functioning requires that "[t]he time of appealability, having jurisdictional consequences, should above all be clear." *Id.* As "[u]ncertainty regarding the question of jurisdiction is particularly undesirable, and collateral litigation on the point particularly wasteful," *Grupo Dataflux v. Atlas Global Group, LP*, 541 U.S. 567, 582 (2004), the questions presented merit this Court's review.

IV. The Federal Circuit Lacked Jurisdiction Over Respondent's Untimely Appeal.

As the November Judgment was a final, appealable judgment, the Federal Circuit should have dismissed respondent's appeal as untimely. Instead, the Federal Circuit exercised jurisdiction that it did not possess, using it to reverse a summary judgment decision that it never should have reviewed. This Court should grant certiorari to address these questions of finality that have confused the lower courts, adopt a bright-line rule establishing the finality of the November Judgment, and rule that the Federal Circuit lacked jurisdiction over respondent's untimely appeal.

a. Contrary to the Federal Circuit's holding, the district court's November Judgment was a "final decision" for purposes of 28 U.S.C. § 1295 because it contained the two essential elements of a final judgment.

First, the November Judgment adjudicated "all the *claims*" of the parties within the meaning of Civil Rule 54(b) by entering judgment in favor of petitioner's patent infringement claims and dismissing with prejudice respondent's patent infringement counterclaims. *See* Fed. R. Civ. P. 54(b) (district court's orders are interlocutory until the entry of an order adjudicating "all the claims" of the parties).

Second, the November judgment granted unqualified *relief* with respect to petitioner's claims, and thereby satisfied the requirement of Rule 54(b) that a final judgment must determine "all the parties' rights and liabilities." Fed. R. Civ. P. 54(b). In accordance with Civil Rule 58, the November Judgment awarded unqualified compensatory relief for petitioner's patent infringement claims in the form of a money judgment for a "sum certain." Fed. R. Civ. P. 58(b)(1)(B). On its face, the November Judgment thus "end[ed] the litigation on the merits and [left] nothing for the court to do except execute the judgment." *See Budinich*, 486 U.S. at 199.

To the extent that the November Judgment did not award the prejudgment interest or supplemental damages sought by petitioner, it was no different from any other judgment that fails to provide the full relief sought by a plaintiff. The remedy to correct an unsatisfactory judgment is to timely move for postjudgment relief or to appeal—not to pretend that the judgment is not final. *See McGowan*, 976 F.2d at 1064 ("The omission of prejudgment interest would not have detracted from the finality of the original judgment; it just would have made it erroneous.").

Thus, there is no material difference between the instant case and *Osterneck*. Both cases involved requests for prejudgment interest that were raised before a district court entered judgment but were not granted until after the judgment was entered. *Osterneck* treated the original unqualified money judgment for a sum certain as final and categorized the postjudgment efforts to resolve the interest issue under Civil Rule 59(e)—a rule that, by design, applies only to efforts to alter or amend a final judgment. *See* Fed. R. Civ. P. 54(a) ("'Judgment' as used in these rules includes . . . any order from which an appeal lies."); *Bankers Trust,* 435 U.S. at 384 n.4 ("A 'judgment' for purposes of the Federal Rules of Civil Procedure would appear to be equivalent to a 'final decision' as that term is used in 28 U.S.C. § 1291."). Consistent treatment here compels the conclusion that the unqualified November Judgment for a sum certain was final, notwithstanding the absence of prejudgment interest, because the November Judgment necessarily denied prejudgment interest.[10]

b. Respondent also argued below that even if the November Judgment was final, under Appellate Rule 4(a)(4)(A) the filing of tolling motions tolled its time to file a notice of appeal, and that its time to file a notice of appeal did not begin to run until the entry of the Amended Judgment, which modified the injunction contained in the November Judgment. Respondent is wrong.

---

[10] For the same reasons, the unqualified November Judgment for a sum certain also necessarily denied petitioner's claim for supplemental damages.

Appellate Rule 4 dictates that when a postjudgment tolling motion is filed, the time to file a notice of appeal begins to run from "the entry of the order *disposing* of the last such remaining [tolling] motion," Fed. R. App. 4(a)(4)(A) (emphasis added)—not from the date of any subsequent amended judgment. To "dispose" means "[t]o settle or decide a matter." *The American Heritage Dictionary of the English Language* 380 (1981). An order *granting* a motion to alter or amend a judgment plainly settles or decides the motion, as even the Seventh Circuit recognizes. *See Titan*, 400 F.3d at 488–489 (under plain text of Appellate Rule 4, order granting tolling motion would count as order "disposing" of motion).

This Court has admonished the courts of appeals to apply Appellate Rule 4's "plain wording," *Acosta v. La. Dep't of Health & Human Resources*, 478 U.S. 251, 253 (1986), in an "implacable fashion," even if this leads to a "harsh result." *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317–318 (1988). The Seventh Circuit's concerns about the practicality of such a rule cannot override the plain text of Appellate Rule 4. The rule's consistent, decades-long use of the word "disposing" as a synonym for the previously used phrase "granting or denying"[11] negates *Titan's* effort to limit the term to "denying."

Applying Appellate Rule 4's plain meaning here, respondent's appeal was untimely. The district court

---

[11] In 1993, amendments to Appellate Rule 4(a)(4)(A) replaced the phrase "granting or denying" with the word "disposing." *See supra* note 7.

disposed of the parties' tolling motions in its March 16, 2009 Order. Pet. App. 36a–50a. Therefore, respondent's notice of appeal was due 30 days from March 16, 2009, *i.e.*, by no later than April 15, 2009. Because respondent filed its notice of appeal on April 17, 2009, two days late, that notice was untimely.

CONCLUSION

For the reasons provided above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

MARGARET M. DUNCAN*
KEITH M. STOLTE
MCDERMOTT WILL & EMERY LLP
227 West Monroe Street
Suite 4400
Chicago, Illinois 60606
(312) 372-2000
mduncan@mwe.com

M. MILLER BAKER
MICHAEL S. NADEL
JEFFREY W. MIKONI
MCDERMOTT WILL & EMERY LLP
600 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 756-8000

Attorneys for Petitioner Extreme Networks, Inc.
** Counsel of Record*

March 2011